

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
SEPTEMBER 12, 2007 Session

**FRANK BARRETT d/b/a BARRETT CONSTRUCTION COMPANY
v. TENNESSEE OCCUPATIONAL AND HEALTH REVIEW
COMMISSION**

**Direct Appeal from the Chancery Court for Davidson County
No. 05-739-I Claudia Bonnyman, Chancellor**

No. M2006-02338-COA-R3-CV - Filed December 27, 2007

In this appeal, we are asked to reexamine whether the Fifty Dollar Fines Clause of the Tennessee Constitution applies to administrative agencies. The Tennessee Occupational Safety and Health Review Commission fined a business owner \$950 for various jobsite violations. The business owner appealed to the chancery court, arguing that the \$950 fine violates Article VI, § 14 of the Tennessee Constitution. After considering the constitutional argument, the chancery court affirmed the agency's decision. We affirm, finding that Article VI, § 14 does not apply to administrative agencies.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the court, in which W. FRANK CRAWFORD, J., and DAVID R. FARMER, J., joined.

John E. Herbison, Nashville, TN, for Appellant

Robert E. Cooper, Jr., Attorney General and Reporter, Warren A. Jasper, Assistant Attorney General, Nashville, TN, for Appellee

OPINION

I. FACTS & PROCEDURAL HISTORY

Frank Barrett (“Appellant” or “Barrett”) is the sole proprietor of Barrett Construction Company, located in Nolensville, Tennessee. On October 5, 2000, an employee of the Tennessee Occupational Safety and Health Administration (“TOSHA”) conducted an inspection of one of Barrett’s worksites located in Winchester, Tennessee. At the construction site, Barrett’s employees were re-roofing a church. TOSHA sent Barrett a “Citation and Notification of Penalty,” which stated that a TOSHA employee observed four violations at the Winchester site – three “serious” violations and one “non-serious” violation. The first citation, with a penalty amount of \$350, was for the “serious violation” of Barrett’s employee working on the steep roof without use of a protective guardrail system, safety net, or personal fall arrest system. The second citation, with a penalty amount of \$300, was for the “serious violations” of the use of a vertical lifeline that did not have a minimum breaking strength of 5,000 pounds, and the use of vertical lifelines that were not protected against abrasions or cuts. The third and final citation, with a penalty amount of \$300, was for the use of a portable metal ladder with a broken rung.

Barrett requested a hearing before the Tennessee Occupational Safety and Health Review Commission (“Review Commission”). David Thomas, a safety supervisor with the Department of Labor and Workforce Development, testified at the hearing on January 20, 2005, concerning the violations that he observed at the worksite. Mr. Thomas testified that a “serious violation” is “[a]ny violation that would result in serious injury or has the potential to result in a serious injury of an employee.” Mr. Thomas testified that the first “serious violation” in this case carries a penalty of \$3,500; however, in assessing Barrett’s penalties, he took into consideration certain “reduction factors” contained in the TOSHA Field Operations Manual, including the small size of Barrett’s company, the good faith effort of Barrett’s foreman in immediately correcting the violations, and the fact that Barrett’s company had no previous citations in the past five years.¹ Likewise, the other two violation penalties were reduced. Barrett’s attorney did not dispute that the violations occurred.

The Review Commission sustained the citations and assessed a fine against Barrett for \$950. Barrett appealed the matter to the chancery court in Davidson County, and Chancellor Bonnyman heard the appeal on July 28, 2006. Barrett argued that the \$950 punitive fine imposed by the Review Commission without a jury violates the Fifty Dollar Fines Clause of Article VI, § 14 of the Tennessee Constitution. After considering the constitutional argument raised by Barrett, the chancery court affirmed the agency’s decision, relying on *Dickson v. State of Tennessee*, 116 S.W.3d 738 (Tenn. Ct. App. 2003). This appeal ensued.

II. ISSUE PRESENTED

¹ “In making such [penalty] assessment, the commissioner shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the employer charged, the gravity of the violation, the good faith of the employer and the employer’s history of previous violations.” Tenn. Code Ann. § 50-3-101 (2005).

Appellant presents the following issue, which we slightly reword: whether we should decline to follow ***Dickson v. State of Tennessee***, 116 S.W.3d 738 (Tenn. Ct. App. 2003), because the Fifty Dollar Fines Clause of Article VI, § 14 of the Tennessee Constitution applies to punitive fines imposed by administrative agencies.

III. STANDARD OF REVIEW

When reviewing an administrative agency's decision, this Court has the authority to determine whether a constitutional violation has occurred. Tenn. Code Ann. § 4-5-322(h)(1). Constitutional interpretation involves questions of law that we review *de novo*. ***State v. Burns***, 205 S.W.3d 412, 414 (Tenn. 2006) (citing *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn.2001)).

IV. DISCUSSION

Barrett contends that the Middle Section's holding in ***Dickson***² is inconsistent with previous Tennessee Supreme Court decisions. Barrett also contends that the fine in this case, "imposed after the fact and unconditionally, payable to an agency of the State, for violations that had already been remedied, plainly served a primarily punitive purpose."

Barrett's main contention is that our Supreme Court has interpreted the language of Art VI, § 14 broader than the Middle Section did in the ***Dickson*** decision. We begin our analysis with a review of ***Dickson***. In that case, the Commissioner of Environment and Conservation charged Dickson with violations of the Tennessee Petroleum Underground Storage Tank Act. ***Dickson v. State of Tennessee***, 116 S.W.3d 738, 740 (Tenn. Ct. App. 2003). Pursuant to Tenn. Code Ann. § 68-215-121(a)(1), the Commissioner had the authority to impose a civil penalty up to \$10,000 per day for a violation of the statute. ***Id.*** The parties entered an agreed order, assessing Dickson fines of \$62,500, but provided that if Dickson complied with the order, the Commission would only fine him \$5,000. ***Id.*** Dickson committed two violations of the agreed order, and pursuant to the terms of the order, Dickson was fined a \$15,000 civil penalty. ***Id.***

The Middle Section of this Court addressed Dickson's argument that the \$15,000 penalty violated the Fifty Dollar Fines Clause of our Constitution. The Court framed the issue as "whether this provision applies to the government as a whole or only to the judiciary." ***Id.*** at 741. The Court ultimately reached the conclusion that Article VI, § 14 only applies to the judiciary. Although the

² While Barrett makes much of the fact that no permission to appeal was filed in ***Dickson***, we point out that pursuant to Rule 11 of the Rules of the Court of Appeals of Tennessee, the opinion was presented to all members of the Court and at least seven members approved publication.

Court admitted that the broad language of the constitutional provision suggested “a wider application,” the Court found it “significant that the constitution contains a separate prohibition against excessive fines that does bind the other branches of the government.” *Id.* at 742. (citing Tenn. Const. art I, § 16; *State v. Taylor*, 70 S.W.3d 717 (Tenn. 2002)). The Court also relied on the placement of the clause in the judicial article as support for its conclusion that it only applied to the judicial branch. *Id.*

The *Dickson* Court placed great weight on the Supreme Court’s decision of *France v. State*, 65 Tenn. 478 (1873), interpreting that opinion as standing “for the proposition that Article VI § 14 of our Constitution applies only to the judiciary and not to the government as a whole.” *Id.* at 742. In *France*, the criminal court fined the defendant \$500, pursuant to statute, for each conviction of the sale of lottery tickets. The Supreme Court found that “the provision in our own Constitution that a fine exceeding fifty dollars cannot be imposed unless assessed by a jury refers to cases where the court has a discretion in fixing the amount of the fine. It can have no application to the case in hand, where the Legislature had peremptorily fixed the fine at five hundred dollars in every case.” *France v. State*, 65 Tenn. 478, 485-86 (1873). The Court in *Dickson* distinguished previous Supreme Court cases dealing with the fifty dollar limitation as ones involving fines imposed by the judiciary, whereas the fine assessed against Dickson was set by legislation and assessed by an agency. *Dickson*, 116 S.W.3d at 741 (citing *State v. Martin*, 940 S.W.2d 567, 570 (Tenn. 1997); *State v. Bryant*, 805 S.W.2d 762, 763 (Tenn. 1991); *Upchurch v. State*, 153 Tenn. 198, 281 S.W. 462 (1926)). “The opinions of our Supreme Court dealing with Article VI § 14 have come from cases that involve fines imposed by the judiciary, and the court generally recites a fear of a powerful judiciary as a reason for the provision.” *Dickson*, 116 S.W.3d at 741.

Turning back to the present case, Barrett points to *City of Chattanooga v. Davis*, 54 S.W.3d 248 (Tenn. 2001), and the companion case of *Barrett v. Metropolitan Government of Nashville*, in which Barrett was a party, as support of his contention that the Fifty Dollar Fines Clause applies to administrative agencies. The Court in *Dickson* did cite to *City of Chattanooga* to point out “that little is known about the origins of [the Fifty Dollar Fines Clause].” *Dickson v. State of Tennessee*, 116 S.W.3d 738, 741 (Tenn. Ct. App. 2003). The Court also pointed to that Supreme Court opinion when it stated that “[w]e think it is significant that [the Fifty Dollar Fines Clause] has been in the judicial article since our first constitution of 1796.” *Id.* at 742. In *City of Chattanooga*, a Chattanooga City Court assessed a fine of \$300 against Davis. *Id.* at 253. In the companion case of *Barrett v. Metropolitan Government of Nashville*, Barrett was fined \$500 for failure to obtain work permits and two other violations. *Id.* at 255. The Supreme Court held that Article VI, § 14 applies to fines imposed for violations of municipal ordinances when the fine is punitive in nature. *Id.* at 262.

Turning back to the case at bar, we are not dealing with a violation of a municipal ordinance. As we have previously noted, the Court of Appeals in *Dickson* rested its decision on *France*, because that Supreme Court decision dealt with a fixed fine as determined by the legislature. We

agree with the Middle Section that *France* is more on point than other cases dealing with fines imposed by the judiciary, because this case deals with statutorily set fines imposed by an administrative agency.³ With that being said, we also agree with the reasoning employed in *Dickson* and decline to deviate from its ruling, unless the Supreme court instructs us otherwise. As to Barrett's contention that the \$950 fine is punitive, *Dickson* tells us that regardless of the punitive nature of a fine, Article VI, § 14 does not apply to a state agency. *Dickson*, 116 S.W.3d at 740.

V. CONCLUSION

For the aforementioned reasons, we affirm. Costs of the appeal are assessed against Appellant, Frank Barrett, and his surety for which execution may issue if necessary.

ALAN E. HIGHERS, P.J., W.S.

³ “The commissioner of labor and workforce development has the authority to assess monetary penalties as provided in §§ 50-3-402--50-3-408 for any violation of this chapter or of any standard, rule or order adopted by regulation promulgated by the commissioner pursuant to this chapter.” Tenn. Code Ann. § 50-3-101 (2005). The statute goes on to provide for the assessment of a penalty up to \$7,000 for both serious and non-serious violations. Tenn. Code Ann. § 50-3-403 and § 50-3-405 (2005).